

Chapter 1

The principle of distinction

Section 1– The principle of distinction between civilians and combatants

1. Customary International Humanitarian Law

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants.

Attacks may only be directed against combatants.

Attacks must not be directed against civilians.¹

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.²

Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.³

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians⁴.

Rule 6. Civilians are protected against attack unless and for such time as they take a direct part in hostilities⁵.

2. Treaties

2.1. The Hague Regulations 1907

Article 1

¹ J-M. Henckaerts and L. Doswald-Beck: “The three components of this rule are interrelated and the practice pertaining to each of them reinforces the validity of the others. The term “combatant” in this rule is used in its generic meaning, indicating persons who do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status. This rule has to be read in conjunction with the prohibition to attack persons recognised to be hors de combat (see Rule 47) and with the rule that civilians are protected against attack unless and for such time as they take a direct part in hostilities (see Rule 6)”.

² Hague Regulations, Article 3; Additional Protocol I, Article 43(2)

³ J-M. Henckaerts and L. Doswald-Beck. In essence, this definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command. As a result, a combatant is any person who, under responsible command, engages in hostile acts in an armed conflict on behalf of a party to the conflict. The conditions imposed on armed forces vest in the group as such. The members of such armed forces are liable to attack.

⁴ Article 50 of Additional Protocol I

⁵ Article 51(3) of Additional Protocol I

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- 1) To be commanded by a person responsible for his subordinates;
- 2) To have a fixed distinctive emblem recognizable at a distance;
- 3) To carry arms openly; and
- 4) To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army".

Article 3

The armed forces of the belligerent parties may consist of combatants and non-combatants.

Article 25

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

2.2. Fourth Geneva Convention

Article 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

2.3. Additional Protocol I

Article 43 adopted by consensus

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities”.

Article 48, para 1, adopted by consensus

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 50 adopted by consensus – Definition of civilians and civilian population⁶

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Article 51 – Protection of the civilian population⁷

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

⁶ ICRC, Official commentary :

<http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/f387522ee8a5c20fc12563cd004346d4>

⁷ ICRC, official commentary:

<http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741>

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57

Article 52 – General protection of civilian objects⁸

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

2.4. ICC Statute

War crime of attacking civilians, Article 8, 2, b, i

⁸Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions. ICRC, official commentary: <http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5f27276ce1bbb79dc12563cd00434969>

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

Elements of crime

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

2.5. Lieber Code, 1863

As civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms.

2.6. Oxford Manual, 1880

Article 1

The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts.”

3. International case law

3.1. ICJ

In its advisory opinion in the *Nuclear Weapons case*, the Court stated that the principle of distinction was one of the “cardinal principles” of international humanitarian law and one of the “intransgressible principles of international customary law”⁹.

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause

⁹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, paras 78–79.

unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law .

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (*I. C. J. Reports 1949, p. 22*), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

3.2. ICTY

ICTY, Karadzic and Mladic, 1995

In the *Karadzic and Mladic case* before the ICTY in 1995, the accused were charged with "deliberate attack on the civilian population and individual civilians" in violation of the laws or customs of war for their role in the shelling of civilian gatherings and the sniping campaign against the civilian population of Sarajevo.¹⁰ In its review of the indictment in 1996, the ICTY Trial Chamber confirmed all counts.¹¹

ICTY, Tadic, 1996

¹⁰ ICTY, *Karadzic and Mladic*, 24 July 1995, paras 36 and 45.

¹¹ ICTY, *Karadzic and Mladic*, 11 July 1996, Section VII, Disposition.

In the pre-trial brief in the *Tadic case* in 1996, the ICTY Prosecutor argued that the term civilian in Article 5 of the ICTY Statute (crimes against humanity) covered all non-combatants within the meaning of common Article 3 of the 1949 Geneva Conventions. Reaffirming the customary nature of common Article 3, the Prosecutor specified that “it provides an authoritative definition of noncombatants or ‘protected persons’ in the broad sense of international humanitarian law”.¹² In its response, the Defence agreed that the term “civilian” under Article 5 did cover all non-combatants, but argued that the concept of non-combatant was not always easy to delineate, especially when groups were not under the direct control of a central government (as was allegedly the case in Bosnia and Herzegovina).¹³ In its judgement in 1997, the ICTY Trial Chamber stated that “determining which individuals of the targeted population qualify as civilians for purposes of crimes against humanity” was not as clear as other concepts. The Trial Chamber ruled that:

Common Article 3, the language of which reflects “elementary considerations of humanity” which are “applicable under customary international law to any armed conflict”, provides that in an armed conflict “not of an international character” Contracting States are obliged “as a minimum” to comply with the following: “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.” AP I defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy.

The same applies to the definition contained in AP I and the Commentary, GC IV on the treatment of civilians, both of which advocate a broad interpretation of the term “civilian”. They, and in particular common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional “non-combatant” because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in furtherance or as part of an attack directed against a civilian population.¹⁴

ICTY, Martić, 1995

In the *Martić case* before the ICTY in 1995, the accused was charged with “an unlawful attack against the civilian population and individual civilians of Zagreb” in violation of the laws or customs of war.⁴⁵⁷ In its review of the indictment in 1996, the ICTY Trial Chamber stated that “as regards customary law, the rule that the civilian population, as well as individuals civilians, shall

ICTY, Kordić and Cerkez, 1998

¹² ICTY, *Tadic*, 10 April 1996, p. 45.

¹³ ICTY, *Tadic*, 23 April 1996, p. 19..

¹⁴ ICTY, *Tadic*, May 1997, para 639.

In the *Kordic and Cerkez case* before the ICTY in 1998, the accused were charged with “unlawful attack on civilians” in violation of the laws or customs of war.¹⁵ In the decision on the joint defence motion in 1999, the ICTY Trial Chamber held that it was “indisputable” that the general prohibition of attacks against the civilian population was a generally accepted obligation and that as a consequence, “there is no possible doubt as to the customary status” of Articles 51(2) AP I and 13(2) AP II “as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts”.¹⁶ In its judgement in 2001, the ICTY Trial Chamber stated that:

Prohibited attacks are those launched deliberately against civilians . . . in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population . . . Such attacks are in direct contravention of the prohibitions expressly recognized in international law including the relevant provisions of Additional Protocol I.¹⁷ The Tribunal found the accused guilty of “a violation of the laws or customs of war, as recognized by Article 3 [of the ICTY Statute] (unlawful attack on civilians)”.¹⁸

ICTY, Tadic, 1999

The Geneva Conventions intend to protect civilians "who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons", bearing in mind that "already in 1949, the legal bond of nationality was not regarded as crucial". In doing so, the Appeals Chamber determined that:

"Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. [...] In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such." ¹⁹

ICTY, Tadic, 1999

The ICTY Appeals Chamber in the *Tadic* case found that "nationality", as provided for in article 4 GC IV, is not the crucial test for determining whether an individual civilian has protected status under GC IV. According to the ICTY Appeals Chamber: [...] not only the text and the drafting history of the Convention but also, and more conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.²⁰

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¹⁵ ICTY, *Kordic and Cerkez*, 30 September 1998, paras 40 and 41.

¹⁶ ICTY, *Kordic and Cerkez*, 2 March 1999, para 31.

¹⁷ ICTY, *Kordic and Cerkez*, 26 February 2001, para 328.

¹⁸ ICTY, *Kordic and Cerkez*, 26 February 2001, Section V, Disposition. See also: ICTY, *Kupreskic*, 14 January 2000, para 521.

¹⁹ ICTY, *Tadic*, Appeals Judgement, 15 July 1999, paras 164, 165 and 168.

²⁰ ICTY, *Tadic*, Appeals Judgement, 15 July 1999, para. 166

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*ICTY, Aleksovski, 2000*²²

The Prosecution submits that, if it is established that the conflict was international by reason of Croatia's participation, it follows that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV is applicable.

ICTY, Martić, 2000

In the *Martić case*, the ICTY Trial Chamber stated that "as regards customary law, the rule that the civilian population, as well as individuals civilians, shall not be the object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts". The Trial Chamber upheld all counts of the indictment.²³

ICTY, Blaskić, 2000

In its judgment in the *Blaskić case* in 2000, the ICTY defined civilians as "persons who are not, or no longer, members of the armed forces"²⁴.

ICTY, Delalić, 2001

The Appeals Chamber held that already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. Formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds".²⁵

*ICTY, Trial judgment, Martinović, 2003*²⁶

Article 4 (1) of Geneva Convention IV, which defines protected persons as "those civilians who find themselves" in the hands of a Party to the conflict or Occupying Power of which they are not nationals. It further submits that the expression "in the hands of" should not be interpreted literally, and that persons who find themselves in

²¹ ICTY, Tadić, Appeals Judgement, 15 July 1999, paras 164, 165, 168;

²² ICTY, Aleksovski, Appeals Judgement, 24 March 2000, paras 147- 152:

²³ ICTY, Martić, 8 March 1996, paras 10, 11–14 and Section III, Disposition; ICTY, Tadić, Interlocutory Appeal, 2 October 1995, paras 100–127; Kupreskić, Judgement, 14 January 2000, para 521.

²⁴ ICTY, Blaskić, 3 March 2000, § 180.

²⁵ ICTY, Delalić, Appeals Judgement, 20 February 2001, paras 57

²⁶ ICTY, Martinović, 23 March 2003, paras 203, 208, 221.

territory that is under the control of an occupying power are protected under Article 4(1) of the Geneva Convention IV.”

Furthermore, the Chamber accepts the argument of the Prosecution that the expression "in the hands of a party or occupying power, as it appears in Article 4 of Geneva Convention IV. refers to persons finding themselves on the territory controlled by that party or occupying power.

The Chamber accepts this to mean that the application of the law of occupation as it affects "individuals" as civilians protected under Geneva Convention IV do not require that the occupying power have actual authority. For the purposes of those individuals' rights, a state of occupation exists upon their falling into "the hands of the occupying power." Otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established.

ICTY, Galic, 2003

In its judgment in the *Galic case* in 2003, the Trial Chamber found the accused guilty of “acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I, as a violation of the laws or customs of war under Article 3 of the Statute of the Tribunal”²⁷.

In case of doubts as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.²⁸

ICTY, Naletilic, 2003

The Naletilic Defence submits that in order for victims to gain "protected persons" status, it is required that the person be of a different nationality than the perpetrators of the alleged offence. For its part, the Martinovic Defence argues that the conflict was political rather than ethnic and that the victims may not be considered as protected persons "since they were of the same nationality as the opposing forces. Article 4 of Geneva Convention IV defines as protected persons "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." According to the Commentary to Geneva Convention IV there are two main types of protected persons: (i) "enemy nationals" and (ii) "the whole population" of occupied territories (excluding nationals of the Occupying Power)."²⁹

Synthesis of ICTY case-law, Perisic, 2011

Attack

²⁷ ICTY, Stanislav Galic, 5 December 2003, para 769.

²⁸ ICTY, Galic, 5 December 2003, para. 51.

²⁹ ICTY, Naletilic and Martmovic, 31 March 2003, paras 204-205:

81. An “attack” may be defined as a course of conduct involving the commission of acts of violence.³⁰

In the context of crimes against humanity, an “attack” is distinct from the concept of “armed conflict” and not limited to the use of armed force. Rather, it may encompass any mistreatment of the civilian population.³¹

The attack may precede, outlast or continue during the armed conflict and need not be part of it.³²

83. The attack must have been directed against the civilian population.³³

This means that the civilian population must be the primary object of attack.³⁴ It is not a requirement that the attack be against the whole civilian population. However, a Trial Chamber must be satisfied that the attack was in fact directed against a civilian population, rather than against a limited and randomly selected number of individuals.³⁵

84. A population may qualify as “civilian” even if individuals who do not fall within the definition of civilians are among it.³⁶ In order to determine whether the presence of non-civilians deprives the population of its civilian character, the number of non-civilians, as well as whether they are on leave or laid down their arms, must be examined.³⁷

The requirement under Article 5 that an attack be directed against a civilian population does not mean that the individual victims of criminal acts committed within the attack must be civilians only.³⁸

³⁰ ICTY, Kmojelac Trial Judgement, para. 54; Kunarac et al. Appeal Judgement, para. 89, affirming Kunarac et al. Trial Judgement, para. 415.

³¹ ICTY, Kunarac et al. Appeal Judgement, paras 86, 89, affirming Kunarac et al. Trial Judgement, para. 416.

³² ICTY, Kunarac et al. Appeal Judgement, para. 86; Tadic Appeal Judgement, para. 251.

³³ ICTY, Kunarac et al. Appeal Judgement, para. 85.

³⁴ ICTY, Martić Appeal Judgement, para. 305; Kunarac et al. Appeal Judgement, para. 91, affirming Kunarac et al. Trial Judgement, para. 421. The Appeals Chamber in Kunarac et al. indicated that the relevant factors to be considered in this regard include: “the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war”, Kunarac et al. Appeal Judgement, para. 91.

³⁵ ICTY, Martić Appeal Judgement, para. 305; Kunarac et al. Appeal Judgement, para. 90.

³⁶ See Article 50(3) of Additional Protocol I; ICTY, Galic Appeal Judgement, paras 136-137, 144; ICTY, Kordic and Cerkez Appeal Judgement, paras 50, 97; ICTY, Blaskic Appeal Judgement, paras 113, 115. The Appeals Chamber held “that the definition of civilian contained in Article 50 of Additional Protocol I reflects the definition of civilian for the purpose of applying Article 5 of the Statute”, ICTY, Martić Appeal Judgement, para. 302. See also ICTY, Galic Appeal Judgement, para. 144, fn. 437; ICTY, Kordic and Cerkez Appeal Judgement, para. 97; ICTY, Blaskic Appeal Judgement, paras 110-114. As regards the definition of civilians, see also *infra* para. 92.

³⁷ ICTY, Galic Appeal Judgement, paras 136-137, 144; Blaskic Appeal Judgement, paras 113, 115.

³⁸ ICTY, Martić Appeal Judgement, paras 305, 307.

The jurisprudence of the Tribunal does not suggest that a Trial Chamber is required to determine whether every single individual victim of the alleged crimes against humanity is a “civilian” under international humanitarian law.³⁹ As a consequence, persons hors de combat may also fall under the protection of Article 5 of the Statute.⁴⁰

86. The attack must also be widespread or systematic.⁴¹ “Widespread” means that the attack is large in scale with a large number of victims, while “systematic” refers to the organised nature of the attack.⁴² It is settled jurisprudence that the existence of a plan need not be proven.⁴³

87. The acts of the perpetrator must form part of the attack.⁴⁴ However, they need not be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack for the purpose of Article 5.⁴⁵

88. The perpetrator must know that there is an attack directed against the civilian population and that his acts are part of that attack, or at least he must take the risk that his acts form part thereof.⁴⁶ However, knowledge of the details of the attack is not necessary.⁴⁷ Neither is it required that the perpetrator share the purpose or goal behind the attack.⁴⁸

Attacks on Civilians

The crime of attacks on civilians is based upon Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II both of which provide, in their relevant parts, that “[t]he civilian population as such, as well as individual civilians, shall not be made the object of attack”.⁴⁹

1. Actus Reus

³⁹ ICTY, Martić Appeal Judgement, para. 308.

⁴⁰ ICTY, Martić Appeal Judgement, para. 311.

⁴¹ ICTY, Kunarac et al. Appeal Judgement, para. 85.

⁴² ICTY, Galić Trial Judgement, para. 146; ICTY, Kunarac et al. Appeal Judgement, para. 94. Whether the attack was widespread or systematic must be ascertained in light of the means, methods, patterns, resources, participation of officials or authorities, and result of the attack upon that population, Kunarac et al. Appeal Judgement, para. 95.

⁴³ ICTY, Kunarac et al. Appeal Judgement, para. 98; ICTY, Blaskić Appeal Judgement, para. 120, also holding that the existence of a plan “may be evidentially relevant in proving that an attack was directed against a civilian population and that it was widespread or systematic”.

⁴⁴ ICTY, Mrksić and Sljivancanin Appeal Judgement, para. 41; ICTY, Kunarac et al. Appeal Judgement, paras 85, 99-100; ICTY, Tadić Appeal Judgement, paras 248, 255.

⁴⁵ ICTY, Kunarac et al. Appeal Judgement, para. 100.

⁴⁶ ICTY, Blaskić Appeal Judgement, para. 124; Kordić and Cerkez Appeal Judgement, para. 99; Kunarac et al. Appeal Judgement, paras 99, 102; Tadić Appeal Judgement, para. 248.

⁴⁷ ICTY, Kunarac et al. Appeal Judgement, para. 102.

⁴⁸ ICTY, Kunarac et al. Appeal Judgement, para. 103, also providing that it is the attack, not the acts of the perpetrator, which must be directed against the target population.

⁴⁹ See Article 51(2) of Additional Protocol I; Article 13(2) of Additional Protocol II.

The actus reus of the crime of attacks on civilians is conducting an attack directed against the civilian population or individual civilians causing death or serious injury to body or health.⁵⁰

91. The term “attack” is defined under Article 49 of Additional Protocol I as “acts of violence against the adversary, whether in offence or in defence”.⁵¹

92. Article 50 of Additional Protocol I⁵² defines a “civilian” as “any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of Additional Protocol I”. The term “civilian” is defined negatively as anyone who is not a member of the armed forces or of an organised military group belonging to a party to the conflict.⁵³ Members of the armed forces and members of militias or volunteer corps forming part of such armed forces cannot claim civilian status. Neither can members of organised resistance groups.⁵⁴

The Appeals Chamber has held that: [T]he specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.⁵⁵

93. The protection from attack afforded to civilians is suspended when and for such time they directly take part in hostilities.⁵⁶ In such cases, they become a legitimate target. Taking “direct” part in the hostilities entails engaging in acts of war that by their nature or purpose are likely to cause actual harm to the personnel or materiel of the enemy armed forces.⁵⁷

⁵⁰ ICTY, Milosevic Trial Judgement, para. 942; ICTY, Galic Trial Judgement, paras 53, 56.

⁵¹ ICTY, Kordic and Cerkez Appeal Judgement, para. 47; ICTY, Martić Trial Judgement, para. 68; Galic Trial Judgement, para. 52.

⁵² In interpreting Article 50 of Additional Protocol I in the context of Article 3 of the Statute, the Trial Chamber has referred to the jurisprudence concerning the definitions of a “civilian” and a “civilian population” in the context of Article 5 of the Statute and in light of the following Appeals Chamber holdings: Blaskić Appeal Judgement, para. 110 (stating that “Article 50 of Additional Protocol I contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law”); Martić Appeal Judgement, para. 299 (holding that “while certain terms have been defined differently in international humanitarian law and in the context of crimes against humanity, the fundamental character of the notion of civilian in international humanitarian law and international criminal law militates against giving it differing meanings under Article 3 and Article 5 of the Statute”).

⁵³ ICTY, Galic Trial Judgement, para. 47; ICTY, Milosevic Trial Judgement, para. 945.

⁵⁴ ICTY, Blaskić Appeal Judgement, para. 113; ICTY, Martić, Appeal Judgement, para. 292. See also Article 4(A) of the Third Geneva Convention.

⁵⁵ ICTY, Martić Appeal Judgement, para. 295; ICTY, Galic Appeal Judgement, fn. 437; ICTY, Blaskić Appeal Judgement, para. 114. See also ICRC Commentary on Additional Protocols, para. 1676 (with respect to Article 43(2) of Additional Protocol I).

⁵⁶ Article 51(3) of Additional Protocol I; Article 13(3) of Additional Protocol II; ICTY, Milosevic Trial Judgement, para. 947; Galic Trial Judgement, para. 48.

⁵⁷ ICTY, Milosevic Trial Judgement, para. 947; ICTY, Galic Trial Judgement, para. 48; ICRC Commentary on Additional Protocols, para. 1944 (with respect to Article 51(3) of Additional Protocol I).

94. The presence of individual combatants within the population being attacked does not necessarily deprive the population of its characterisation as civilian.⁵⁸ The Appeals Chamber has held that “in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined”.⁵⁹

95. In determining whether the attack was directed against civilians or the civilian population, the Trial Chamber is entitled to base itself on a case-by-case analysis, taking into account various factors, including: [T]he means and method used in the course of the attack, the status of the victims, their number, [...] the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.⁶⁰

In addition, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the victims’ appearance, including their age, gender, clothing and activity may also be relevant.⁶¹

96. In customary international law, there is an absolute prohibition against targeting of civilians which may not be derogated from due to military necessity.⁶² However, this does not exclude the possibility of civilian casualties incidental to an attack aimed at legitimate military targets provided they are proportionate to the concrete and direct military advantage anticipated prior to the attack.⁶³

97. Indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks on civilians.⁶⁴ In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.⁶⁵ An attack which may cause civilian casualties disproportionate to the concrete and direct military advantage anticipated is to be considered as indiscriminate.⁶⁶ Such an attack may also give rise to the inference that civilians were the object of attack.⁶⁷

⁵⁸ ICTY, Galic Appeal Judgement, para. 136; ICTY, Blaskic Appeal Judgement, paras 113, 115; ICTY, Kordic and Cerkez Appeal Judgement, para. 50.

⁵⁹ ICTY, Galic Appeal Judgement, para. 137; ICTY, Blaskic Appeal Judgement, para. 115; ICRC Commentary on Additional Protocols, para. 1922 (with respect to Article 50(2) and (3) of Additional Protocol I).

⁶⁰ ICTY, Galic Appeal Judgement, para. 132; ICTY, Blaskic Appeal Judgement, para. 106; ICTY, Kunarac et al. Appeal Judgement, para. 91.

⁶¹ ITY, Sugar Appeal Judgement, para. 271; Galic Appeal Judgement, para. 133.

⁶² ICTY, Galic Appeal Judgement, para. 130; Kordic and Cerkez Appeal Judgement, para. 54 (as revised by the ICTY, Kordic and Cerkez Appeal Judgement Corrigendum of 26 January 2005); Blaskic Appeal Judgement, para. 109.

⁶³ ICTY, Galic Appeal Judgement, para. 190; Martić Trial Judgement, para. 69. See also Strugar Appeal Judgement, para. 179. Military objectives that may be lawfully attacked are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”, Article 52(2) of Additional Protocol I; ICTY, Kordic and Cerkez Appeal Judgement, para. 53.

⁶⁴ ICTY, Galic Appeal Judgement, para. 132, affirming Galic Trial Judgement, para. 57. See also Threat or Use of Nuclear Weapons, ICJ Advisory Opinion, para. 78.

⁶⁵ ICTY, Galic Appeal Judgement, para. 132; Galic Trial Judgement, fn. 101.

⁶⁶ ICTY, Galic Trial Judgement, para. 58; Article 51(5)(b) of Additional Protocol I.

⁶⁷ ICTY, Galic Appeal Judgement, para. 132, affirming Galic Trial Judgement, para. 60.

98. The parties to a conflict have an obligation “to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas”.⁶⁸ However, “the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack”.⁶⁹

99. Finally, the attack in question must have resulted in death or serious injury to body or health within the civilian population.⁷⁰

2. Mens Rea

100. In order to satisfy the mens rea required for the crime of attacks on civilians, the Prosecution must establish that the perpetrator wilfully made the civilian population or individual civilians the object of attack.⁷¹ The concept of “wilfulness” encompasses both the notions of direct intent and indirect intent, that is, the concept of recklessness, excluding mere negligence.⁷²

101. It must also be proven that the perpetrator was aware or should have been aware of the civilian status of the persons attacked.⁷³ International humanitarian law dictates that if there is doubt about a person’s status, he shall be considered a civilian.⁷⁴ In the context of a criminal trial, it is the Prosecution that must prove that “in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant”.⁷⁵ The intent to target civilians can be proved through inferences from direct or circumstantial evidence.⁷⁶

The Appeals Chamber further held that “there is no requirement of the intent to attack particular civilians; rather it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack”.⁷⁷

ICTY, Djordjevic, 23 February 2011

⁶⁸ ICTY, Galic Appeal Judgement, para. 194.

⁶⁹ ICTY, Galic Appeal Judgement, para. 194, affirming Galic Trial Judgement, para. 61.

⁷⁰ ICTY, Kordic and Cerkez Appeal Judgement, paras 55-67; ICTY, Milosevic Trial Judgement, para. 942; Galic Trial Judgement, paras 43, 56; ICTY, Blaskic Trial Judgement, para. 180; Article 85(3) of Additional Protocol I.

⁷¹ ICTY, Strugar Appeal Judgement, para. 270; Galic Appeal Judgement, para. 140; Article 85(3)(a) of Additional Protocol I.

⁷² ICTY, Martić Trial Judgement, para. 72. See also Strugar Appeal Judgement, para. 270; Galic Appeal Judgement, para. 140, affirming Galic Trial Judgement, para. 54; ICTY, Milošević Trial Judgement, para. 951; ICRC Commentary on Additional Protocols, para. 3474 (with respect to Article 85(3) of Additional Protocol I).

⁷³ ICTY, Galic Appeal Judgement, para. 140, affirming Galic Trial Judgement, para. 55.

⁷⁴ Article 50(1) of Additional Protocol I. ICRC Commentary on Additional Protocols, para. 1920 stating that the presumption of civilian status applies to “persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked”. See also ICTY, Milosevic Appeal Judgement, para. 60

⁷⁵ ICTY, Galic Appeal Judgement, para. 140, affirming Galic Trial Judgement, para. 55. See also Blaskic Appeal Judgement, para. 111; Kordic and Cerkez Appeal Judgement, para. 48.

⁷⁶ ICTY, Milosevic Appeal Judgement, paras 66-67; ICTY, Strugar Appeal Judgement, para. 271.

⁷⁷ ICTY, Strugar Appeal Judgement, para. 271.

(i) Unlawful attacks on civilians and civilian objects

1840. Since there is an absolute prohibition on the targeting of civilians and civilian objects in customary international law all attacks on civilians and civilian objects are unlawful.⁷⁸

1841. An attack on civilians or civilian objects in the context of crimes against humanity is to be understood as acts of violence deliberately launched against civilians or civilian objects, although with no requirement of a particular result caused by the attack, as well as indiscriminate attacks on cities, towns, and villages. With regard to the term “civilian”, the Trial Chamber refers to chapters 5.2.1 and 5.5.1, above. 1842. An attack on civilians and civilian objects, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution.⁷⁹

3.3. ICC

Pre-Trial Chamber, Katanga, 2007⁸⁰

37. The Chamber considers that the crime provided for under article 8(2)(b)(i) and (2)(e)(i) of the Statute does not require any harmful impact on the civilian population or on the individual civilians targeted by the attack, and is committed by the mere launching of the attack against a civilian population or individual civilians not taking direct part in hostilities, who have not fallen yet into the hands of the attacking party.

The Chamber underlines this distinction

41. The Chamber notes that:

(i) paragraphs (b)(i) and (e)(i) of article 8(2) of the Statute only criminalize conduct consisting of "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;"

(ii) paragraph (b)(ii) of article 8(2) of the Statute only criminalizes conduct consisting of "intentionally directing attacks against civilian objects, that is, objects which are not military objectives;" and

(iii) paragraph (b)(iv) of article 8(2) of the Statute only criminalizes violations of the proportionality rule when an attack is specifically directed against a military objective.

ICC, Pre-Trial Chamber I, Katanga and Chui, 2008⁸¹

The Chamber lies the basic terms.

⁷⁸ ICTY, Blaskic Appeal Judgement, para. 109; Kordic and Cerkez Appeal Judgement, para. 54 ; Galic Appeal Judgement, paras 130, 190.

⁷⁹ ICTY, Blaskic Appeal Judgement, para. 159; Kordic and Cerkez Appeal Judgement, paras 47, 57, 104, 105, 672-673.

⁸⁰ ICC, Pre-Trial Chamber, Katanga, 5 November 2007, No ICC-01/04-01/07.

⁸¹ ICC, Pre-Trial Chamber I, Decision on the confirmation of charges, Katanga and Ngudjolo Chui, 30 September 2008, No ICC-01/04-01/07.

266. The war crime provided for in article 8(2)(b)(i) of the Statute consists of carrying out an attack against one or more individual civilians⁸² not taking active part in hostilities³⁶⁷ or against a civilian population whose allegiance is with a party to the conflict that is enemy or hostile to that of the perpetrator. In this regard, the Chamber notes that in article 49(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 ("the AP I"), the term "attack" is defined as an "act of violence against the adversary, whether in offence or defense."

On this point, the Chamber added:

- According to article 50(1) AP I, "[civilian is any person who does not belong to any of the categories of persons referred to in Article 4 (A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is civilian, that person shall be considered to be a civilian." For the purpose of this Decision, whenever the Chamber refers to "civilians", "civilian population", "protected persons", "protected civilians", or "persons protected" under the Geneva Conventions, it considers that this also encompasses the relevant provisions of the API.
- The expressions "direct part in hostilities" and "active part in hostilities" are to be treated as synonymous.
- According to article 50(2) and (3) AP I, "the civilian population comprises of all persons who are civilians [...] The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character".

Then, the Chamber analyzes:

267. The war crime provided for in article 8(2)(b)(i) of the Statute is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as "conduct of hostilities crimes")⁸³. Accordingly, this crime is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs.

268. The Chamber notes that the jurisprudence of the ICTY has emphasized that an individual civilian, or a civilian population, falls into the hands of an adverse or hostile party to the conflict when it comes under the control of its members.⁸⁴

⁸² The expressions "direct part in hostilities" and "active part in hostilities" are to be treated as synonymous. See K. Dörman, *Elements of War Crimes under the Rome Statute of the International Criminal Court- Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 135.

⁸³ D. Franck, "Article 8(2)(b)(ii) - Attacking Civilians", in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, p. 140

⁸⁴ ICTY, *Martinovic*, 23 March 2003, paras 203; ICTY, *Aleksovski*, Appeals Judgement, 24 March 2000 paras 147- 152.

269. In the view of the Chamber, after an individual civilian not taking an active part in the hostilities or the civilian population falls into the hands of such an adverse or hostile party to the conflict, an act of violence against them does not fall under article 8(2)(b)(i) of the Statute but under other provisions of the Statute, which are addressed below.

270. The war crime provided for in article 8(2)(b)(i) of the Statute is committed when the attack (or the act of violence) is launched because, unlike article 85(3) AP I, it does not require any material result or a "harmful impact on the civilian population or on the individual civilians targeted by the attack, and is committed by the mere launching of the attack on a civilian population or individual civilians not taking direct part in hostilities, who have not yet fallen into the hands of the attacking party."⁸⁵ Such material results include, for instance, that the attack caused death or serious injury to the body or health of the targeted civilians.⁸⁶

271. As regards the subjective elements, in addition to the standard mens rea requirement provided in article 30 of the Statute, the perpetrator must intend to make individual civilians not taking direct part in the hostilities or the civilian population the object of the attack. This offence therefore, first and foremost, encompasses *dolus directus* of the first degree.

272. Hence, once the perpetrators launch the attack with the intent to target individual civilians not taking direct part in the hostilities or the civilian population, the offence is completed. This is the case when individual civilians not taking direct part in the hostilities or the civilian population are the sole target of the attack.

273. The crime is also committed when the perpetrator launches the attack with two distinct specific aims: (i) to target a military objective within the meaning of articles 51 and 52 of AP I; and simultaneously, (ii) to target the civilian population or individual civilians not taking direct part in the hostilities who reside in the vicinity. In such a case, the crime is committed when an attack is launched against a village which has significant military value because of its strategic location and when the village contains two distinct targets:

(i) the defending forces of the adverse or hostile party in control of the village (that is, when only the defeat of these forces would permit the attacking party to seize control of the village); and

(ii) the civilian population of the village, if its allegiance is with the adverse or hostile party in control of the village thus leading the attacking forces to consider the "destruction" of that civilian population as the best method for securing control of the village once it has been seized.

274. This second type of case must be distinguished from the other situations in which an attack is launched with the specific aim of targeting only a military objective, albeit

⁸⁵ ICC-01/04-01/07-55, para. 37; ICC-01/04-01/07-267, para. 38.

⁸⁶ D. Franck, "Article 8(2)(b)(i) - Attacking Civilians", in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, pp. 141-142; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 130.

with the awareness that incidental loss of life or injury to civilians will or may result from such an attack.

ICC, Kantaga et Chui, 30 September 2008

The ICC endorsed the ICTY' Tadic case, which considered the following factors as decisive in assessing the sufficient nexus between conduct and the armed conflict:

- the fact that the perpetrator is a combatant;
- the fact that the victim is a non-combatant;
- the fact that the victim is a member of the opposing party;
- the fact that the act may be said to serve the ultimate goal of a military campaign;
- the fact that the crime is committed as part of or in the context of the perpetrator's official duties.⁸⁷

*ICC, Abu Garda, 2010*⁸⁸

Protection given to civilians

79. In this respect, article 50(1) of API defines civilians as "any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."⁸⁹

81. Furthermore, in the Appeal Judgement in the Strugar case, the ICTY gave examples of "direct participation in hostilities", as recognised in "military manuals, soft law, decisions of international bodies and the commentaries to the Geneva Conventions and the Additional Protocols". These examples include: Bearing, using or taking up arms, taking part in military or hostile acts, conducts or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, and transporting weapons in proximity to combat operations.⁹⁰ ICC, Pre-Trial Chamber I, Abu Garda, ICC-02/05-02/09, 8 February 2010

82. In the Lubanga case, the Chamber also held, in relation to the use of children under the age of fifteen years to actively participate in hostilities,⁹¹ that active participation in hostilities "means not only direct participation in hostilities, combat in other words, but also covers active participation in combat related activities [...]."⁹²

83. In light of the foregoing considerations, the Majority concludes that, under the Statute, personnel involved in peacekeeping missions enjoy protection from attacks

⁸⁷ ICC, Kantaga et Chui, 30 September 2008, ICC-01/04-01/07-717, para. 383; ICTY, Kunarac, Case No. IT-96-23&23/1, Appeals Judgement, 12 June 2002, para. 59.

⁸⁸ ICC, Pre-Trial Chamber I, Abu Garda, ICC-02/05-02/09, 8 February 2010

⁸⁹ ICC, Kantaga et Chui, 30 September 2008, para. 266 and footnote 366. See also Henckaerts, J.M. and Doswald-Beck, L. Customary International Humanitarian Law, Volume 1: Rules, Oxford University Press, Oxford 2005, at Rule 5.

⁹⁰ ICTY, Strugar, Appeal Judgement, 17 July 2008, para. 177.

⁹¹ Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute.

⁹² ICC-01/04-01/06-803-tEN, para. 261. Furthermore, the Chamber previously underlined that "the expressions "direct part in hostilities" and "active part in hostilities" are to be treated as synonymous, see ICC-01/04-01/07-717, para. 266 and footnote 366.

unless and for such time as they take a direct part in hostilities or in combat-related activities. The Majority also finds that such protection does not cease if such persons only use armed force in exercise of their right to selfdefence.⁹³ Finally, and adopting the precedent of the ICTY, the Majority finds that any determination as to whether a person is directly participating in hostilities must be carried out on a case-by-case basis.⁹⁴

84. The Majority notes the non-exhaustive list of criteria⁹⁵ established by the Special Court for Sierra Leone, in its 2 March 2009 Judgment in order to determine whether peacekeeping personnel or objects, of a peacekeeping mission were entitled to protection. That case before the Special Court for Sierra Leone, was, however, limited to attacks on peacekeeping personnel, as the indictment did not contain allegations of attacks against installations, material, units or vehicles involved in a peacekeeping mission.⁹⁶ By contrast, the issue in the present count before this Chamber is the lawfulness of an attack not only on the personnel but also on the objects involved in a peacekeeping mission.

Protection given to civilian objects

85. The Majority notes that, while international humanitarian law offers protection to all civilians in both international armed conflict and armed conflict not of an international character, the same cannot be said of all civilian objects, in respect of which protection differs according to the nature of the conflict. Whereas article 52 of API provides for "general protection of civilian objects" during international armed conflict,⁹⁷ such broad protection is not explicitly provided under Additional Protocol II, which only affords protection to a limited number of civilian objects.⁹⁸

88. In its study on Customary International Humanitarian Law, the ICRC identifies four rules on the distinction between civilian objects and military objectives, which are considered customary law in relation to both international and non-international armed conflicts. Of particular relevance is rule 8, which establishes that the definition of military objective in article 52 (2) of API is also applicable, as a customary rule of international humanitarian law, to armed conflict not of an international character.

⁹³ SCSL, Trial Chamber I, Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Judgment of 2 March 2009, para. 233. The Majority also notes that the SCSL held that "the use of force by peacekeepers in self-defence in the discharge of their mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers" (para. 233).

⁹⁴ ICTY, Strugar, Appeal Judgement, 17 July 2008, para. 178.

⁹⁵ SCSL, Trial Chamber I, Issa Hassan Sesay, Morris Kallon and Augustine Gbao, 2 March 2009, para. 234; these criteria were: (a) the relevant Security Council resolutions for the operation; (b) the role and practices actually adopted by the peacekeeping mission! during the particular conflict; (c) their rules of engagement and operational orders; (d) the nature of the arms and equipment used by the peacekeeping force; (e) the interaction between the peacekeeping force and the parties involved in the conflict, (f) any use of force between the peacekeeping force and the parties in the conflict, and (g) the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.

⁹⁶ SCSL, Trial Chamber I, Issa Hassan Sesay, Morris Kallon and Augustine Gbao, 2 March 2009, para. 213.

⁹⁷ Article 52 states that "[civilian objects shall not be the object of attack or of reprisals."

⁹⁸ APII, article 14 (protection of objects indispensable to the survival of the civilian population), article 15 (protection of works and installations containing dangerous forces) and article 16 (protection of cultural objects and of places of worship).

89. In light of the foregoing considerations, the Majority concludes that installations, material, units or vehicles involved in a peacekeeping mission in the context of an armed conflict not of an international character shall not be considered military objectives, and thus shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁹⁹

*ICC, Abu Garda, 2010*¹⁰⁰

65. The term "attack" is defined in article 49 of Additional Protocol I to the Geneva Conventions of 12 August 1949 ("API") as "acts of violence against the adversary, whether in offence or in defence". Although the definition of an attack is in API, which is only applicable to international armed conflicts, this term is given the same meaning in article 13(2) of Additional Protocol II ("APII"), which applies to armed conflicts not of an international character. Furthermore, unlike article 85 (3) of API, article 8 (2)(e)(iii) of the Statute does not require any material result or any harmful impact on the personnel, installations, material, units or vehicles involved in the peacekeeping mission which are being targeted by the attack.

*ICC, Katanga and Chui, 2008*¹⁰¹

Attack against the civilian population

265. The war crime provided for in article 8(2)(b)(i) of the Statute is defined as "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in the hostilities." According to the Elements of Crimes, in addition to establishing a nexus between the crime and an international armed conflict and the perpetrator's awareness of the factual circumstances establishing the existence of such a conflict, this war crime requires the following three elements: (i) "the perpetrator directed an attack"; (ii) "the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities"; and (iii) "the perpetrator intended the civilian population as such or individual civilians not taking part in hostilities to be the object of the attack."

266. The war crime provided for in article 8(2)(b)(i) of the Statute consists of carrying out an attack against one or more individual civilians¹⁰² not taking active part in

⁹⁹ Article 52(2) of API. See also ICTY, *Galic*, 5 December 2003, para. 51: "In case of doubts as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action".

¹⁰⁰ ICC, Pre-Trial Chamber I, Decision on the Confirmation of Charges, *Abu Garda*, 8 February 2010. No: ICC-0205-02/09.

¹⁰¹ ICC, Pre-trial Chamber I, *Katanga and Chui*, 30 September 2008, ICC-01/04-01/07

hostilities¹⁰³ or against a civilian population¹⁰⁴ whose allegiance is with a party to the conflict that is enemy or hostile to that of the perpetrator. In this regard, the Chamber notes that in article 49(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 ("the AP I"), the term "attack" is defined as an "act of violence against the adversary, whether in offence or defense."

267. The war crime provided for in article 8(2)(b)(i) of the Statute is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as "conduct of hostilities crimes").¹⁰⁵ Accordingly, this crime is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs.¹⁰⁶

268. The Chamber notes that the jurisprudence of the ICTY has emphasised that an individual civilian, or a civilian population, falls into the hands of an adverse or hostile party to the conflict when it comes under the control of its members.¹⁰⁷

269. In the view of the Chamber, after an individual civilian not taking an active part in the hostilities or the civilian population falls into the hands of such an adverse or hostile party to the conflict, an act of violence against them does not fall under article

¹⁰² According to article 50(1) AP I, "[civilian is any person who does not belong to any of the categories of persons referred to in Article 4 (A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is civilian, that person shall be considered to be a civilian." For the purpose of this Decision, whenever the Chamber refers to "civilians", "civilian population", "protected persons", "protected civilians", or "persons protected" under the Geneva Conventions, it considers that this also encompasses the relevant provisions of the API.

¹⁰³ The expressions "direct part in hostilities" and "active part in hostilities" are to be treated as synonymous. See K. Dörmann., *Elements of War Crimes under the Rome Statute of the International Criminal Court- Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 135.

¹⁰⁴ According to article 50(2) and (3) AP I, "the civilian population comprises of all persons who are civilians [...] The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character".

¹⁰⁵ D. Franck, "Article 8(2)(b)(ii) - Attacking Civilians", in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, p. 140

¹⁰⁶ Or into the hands of the armed forces or organised armed group to which the perpetrator belongs.

¹⁰⁷ ICTY, Martinovic, 23 March 2003, paras 203: "Article 4 (1) of Geneva Convention IV, which defines protected persons as "those civilians who find themselves" in the hands of a Party to the conflict or Occupying Power of which they are not nationals. It further submits that the expression "in the hands of should not be interpreted literally, and that persons who find themselves in territory that is under the control of an occupying power are protected under Article 4(1) of the Geneva Convention IV."; ICTY, Aleksovski, Appeals Judgement, 24 March 2000, paras 147-

152: "The Prosecution submits that, if it is established that the conflict was international by reason of Croatia's participation, it follows that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV is applicable. See also J.S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, International Committee of the Red Cross, 1958, p. 47: "[T]he expression 'in the hands of is used in extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or 'hands' of the Occupying Power. [...] In other words, the expression 'in the hands of need not necessarily be understood in the physical sense; it simply means that the person is in the territory which is under the control of the Power in question ".

8(2)(b)(i) of the Statute but under other provisions of the Statute, which are addressed below.

270. The war crime provided for in article 8(2)(b)(i) of the Statute is committed when the attack (or the act of violence) is launched because, unlike article 85(3) AP I, it does not require any material result or a "harmful impact on the civilian population or on the individual civilians targeted by the attack, and is committed by the mere launching of the attack on a civilian population or individual civilians not taking direct part in hostilities, who have not yet fallen into the hands of the attacking party."¹⁰⁸ Such material results include, for instance, that the attack caused death or serious injury to the body or health of the targeted civilians.¹⁰⁹

271. As regards the subjective elements, in addition to the standard mens rea requirement provided in article 30 of the Statute, the perpetrator must intend to make individual civilians not taking direct part in the hostilities or the civilian population the object of the attack. This offence therefore, first and foremost, encompasses *dolus directus* of the first degree.

272. Hence, once the perpetrators launch the attack with the intent to target individual civilians not taking direct part in the hostilities or the civilian population, the offence is completed. This is the case when individual civilians not taking direct part in the hostilities or the civilian population are the sole target of the attack.

273. The crime is also committed when the perpetrator launches the attack with two distinct specific aims: (i) to target a military objective within the meaning of articles 51 and 52 of AP I; and simultaneously, (ii) to target the civilian population or individual civilians not taking direct part in the hostilities who reside in the vicinity. In such a case, the crime is committed when an attack is launched against a village which has significant military value because of its strategic location and when the village contains two distinct targets:

- (i) the defending forces of the adverse or hostile party in control of the village (that is, when only the defeat of these forces would permit the attacking party to seize control of the village); and
- (ii) the civilian population of the village, if its allegiance is with the adverse or hostile party in control of the village thus leading the attacking forces to consider the "destruction" of that civilian population as the best method for securing control of the village once it has been seized.

274. This second type of case must be distinguished from the other situations in which an attack is launched with the specific aim of targeting only a military objective, albeit with the awareness that incidental loss of life or injury to civilians will or may result from such an attack.¹¹⁰

¹⁰⁸ ICC-01/04-01/07-55, para. 37 ; ICC-01/04-01/07-267, para. 38

¹⁰⁹ D. Franck, "Article 8(2)(b)(ü) - Attacking Civilians", in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, pp. 141-142; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 130.

¹¹⁰ The situation in which an attack is launched solely against a military objective, and in which the attackers are aware that such attack will or may cause incidental loss of life or injury to civilian persons or civilian objects, is labeled a "disproportionate attack". The Rome Statute includes such a violation of the principle of

286. The war crime provided for in article 8(2)(a)(i) of the Statute is defined as the "willful killing" of any of the persons protected by the Geneva Conventions. In addition to a nexus with an international armed conflict and the perpetrator's awareness of the factual circumstances establishing the existence of such a conflict, this war crime requires the following three elements: (i) "the perpetrator killed one or more persons"; (ii) "such person or persons were protected under one or more of the Geneva Conventions of 1949"; and (iii) "the perpetrator was aware of the factual circumstances that established the protected status".

287. Pursuant to article 8(2)(a)(i) of the Statute, the war crime of wilful killing occurs when it is committed by someone who, by action or omission, causes the death of one or more persons referred to in articles 13, 24, 25 and 26 GC I, articles 13, 36 and 37 GC II, article 4 GC III and articles 4,13 and 20 GC IV.¹¹²

289. For this reason, and also further to article 4 GC IV, protected persons are those individual civilians³⁹⁶ who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals".

290. The ICTY Appeals Chamber in the Tadic case found that "nationality", as provided for in article 4 GC IV, is not the crucial test for determining whether an individual civilian has protected status under GC IV.¹¹³ According to the ICTY Appeals Chamber:

Not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggests that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.¹¹⁴

291. This Chamber also adopts the approach that the term "nationals" in article 4 GC IV, which was drafted in 1949, reflected, at that time, the perceived importance of

proportionality in the provision of article 8(2)(b)(iv), which is limited to punishing the very violation of the principle of proportionality. In such a situation, the awareness of the perpetrators of the consequences of the attack is an objective element of the crime. See *Elements of Crimes*, footnote 37. Conversely, the crime described in article 8(2)(b)(i) of the Statute, with which Germain Katanga and Mathieu Ngudjolo Chui are charged, is a crime of mere action, that does not requires any factual consequences or any awareness of the perpetrators of the consequences of the attack.

¹¹¹ ICC, Pre-trial Chamber I, *Katanga and Chui*, 30 September 2008, ICC-01/04-01/07.

¹¹² Articles 13, 24-26 GC I, Articles 13, 36-37 GC II, Article 4 GC III, Articles 4, 13, 16, 20 GC IV, Articles 8, 44,45,73,75 and 77 AP I.

¹¹³ According to article 4 GC, civilian is any person who does not belong to any of the categories of persons referred to in article 4(A)(1), (2), (3) and (6) of the Third Convention. As seen above, article 50(1) API extends the definition of civilians to those who do not belong to any of the categories referred to in Article 43 AP I. Moreover, according to article 50(1) AP I, "[i]n case of doubt whether a person is civilian, that person shall be considered to be a civilian."

¹¹⁴ ICTY, *Tajic*, Appeals Judgement, 15 July 1999, para. 166. See also ICTY, *Naletilic and Martmovic*, 31 March 2003, paras 204-205; ICTY, *Tadic*, Appeals Judgement, 15 July 1999, paras 164, 165, 168; ICTY, *Delalic*, Appeals Judgement, 20 February 2001, paras 57, 82.

nationality in determining the allegiances of individual civilians. Although the nexus between nationality and allegiance remains an important factor in determining protected status for persons involved in international armed conflicts, as the ICTY jurisprudence demonstrates, it is no longer the definitive test.¹¹⁵

292. Consequently, article 8(2)(a)(i) of the Statute applies to those cases in which protected civilians are killed "in the hands of" a party to the conflict. Under the case law of the international tribunals, an individual civilian falls "into the hands of" a party to the conflict when that individual is in the territory under the control of such a party.¹¹⁶

293. Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning of article 4 GC IV, provided they do not claim allegiance to the party in question.

Article 8(2)(a)(i) of the Statute thus prohibits the wilful killing of those civilians in such a circumstance.

294. Additionally, article 8(2)(a)(i) of the Statute also applies to the wilful killing of the protected persons by an attacking force, when such killings occur after the overall attack has ended, and defeat or full control of the targeted village has been secured.

295. Article 30 of the Statute sets out the subjective element for crimes falling under the jurisdiction of the Court, including the war crime under article 8(2)(a)(i). Thus, this offence includes the mens rea of, first and foremost, *dolus directus* of the first degree.

296. The Chamber also adopts the ICTY conclusion that "the conduct of the accused must be a substantial cause of the death of the victim."¹¹⁷

297. Finally, article 8(2)(a)(i) of the Statute also requires that the perpetrator is "aware of the factual circumstances that established that protected status" of the victim. Thus, it is not necessary for the perpetrator to have evaluated and concluded that the victim was in fact a protected person under any of the Geneva Conventions.

*ICC, Mbarushimana, 2011*¹¹⁸

Direct participation in hostilities

148. As highlighted in the Abu Garda Confirmation Decision, there is no customary or treaty law definition of what constitutes direct participation in hostilities,¹¹⁹ although

¹¹⁵ In *Elements of Crimes*, footnote 33 makes it clear that "[with] respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict [...]".

¹¹⁶ 399 J.S. Pictet, (Ed.), *Commentary- IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, International Committee of the Red Cross, 1958, p. 47. See also ICTY, *Martinovic*, 23 March 2003, paras 203, 208, 221.

¹¹⁷ K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary*, Cambridge, p. 40, footnote 6 citing ICTY, *The Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Judgement*, 16 November 1998, para. 424 and ICTY, *Kordic and Cerkez*, 26 February 2001, para. 229.

¹¹⁸ ICC Pre Trial Chamber I, *Mbarushimana*, 16 December 2011, ICC-01/04-01/10

useful guidance is provided by the International Committee of the Red Cross ("ICRC").¹²⁰ However, loss of protection is only clear when a civilian uses weapons or other means to commit violence against human or material enemy forces, unless in self defence. Further, practice indicates that supplying food and shelter and sympathizing with one belligerent party is an insufficient reason to deny civilians protection against attack.¹²¹ The term "civilian" in accordance with article 50(1) of the AP I, applies to anyone who is not a combatant, and in case of doubt, the person shall be considered to be a civilian. Additionally, a civilian population comprises all civilians as opposed to members of armed forces and any other legitimate combatants. Further, pursuant to article 50(3) of the AP I, the presence within the civilian population of individuals who do not fit within the definition of civilians does not deprive the entire population of its civilian character.¹²² Yet, civilians may lose protection only for such a time as they take direct part in hostilities or combat-related activities and not permanently.¹²³ Further, the protection does not cease if such persons only use armed force in the exercise of their right to self-defence.¹²⁴

4. International regional case law

IACiHR, Report on Colombia, 1999

A precise definition of the term "direct participation in hostilities" does not exist. The Inter-American Commission on Human Rights has stated that the term "direct participation in hostilities" is generally understood to mean "acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and materiel"¹²⁵.

5. National case law

In the *Kassem case* in 1969, Israel's Military Court at Ramallah recognized the immunity of civilians from direct attack as one of the basic rules of international humanitarian law¹²⁶.

6. International practice

¹¹⁹ ICC Abu Garda Decision, para. 80.

¹²⁰ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, (2008), pp. 995-996. Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge University Press, 2 ed., 2011), p. 149.

¹²¹ See ICRC, *Protecting Civilians in Century Warfare, Target selection. Proportionality and Precautionary Measures in Law and Practice* (The Netherland Red Cross, 2001), p. 13. The ICRC recalls the distinction between "direct" and "indirect" participation advanced by the Inter-American Commission on Human Rights in a Report on Human Rights in Colombia in which it stated that: "Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party." See also Henckaerts and Doswald-Beck, pp. 22-24.

¹²² ICC, Abu Garda Decision, para. 79; ICC, Katanga Decision, fn. 366-368; ICC, Bemba Decision, para. 78; see also ICTY, Kunarac, 22 February 2001, para. 425.

¹²³ Dörmann, *op. cit.*, p. 454.

¹²⁴ ICC Abu Garda Decision, para. 83.

¹²⁵ IACiHR, Third report on human rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, Chapter IV, §§ 53 and 56.

¹²⁶ Israel, Military Court at Ramallah, *Kassem*, Judgment, 13 April 1969.

- *UN Security Council*

In a resolution adopted in 1994, the UN Security Council strongly condemned a “massacre” in Hebron in which more than 50 Palestinian civilians died and several hundred others were injured. The Security Council called for measures to be taken to guarantee the safety and protection of Palestinian civilians throughout the occupied territories.¹²⁷

In a resolution adopted in 1996, the UN Security Council expressed its “deep concern about the tragic events which resulted in a high number of deaths and injuries among the Palestinian civilians”¹²⁸.

- *ICRC*

In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(1) of draft AP I which stated that “the civilian population as such, as well as individual civilians, shall not be made the object of attack”. All governments concerned replied favorably¹²⁹.

7. National references

According to Israel’s Manual on the Laws of War:

Soldiers serving in the army (regular and reserve) or in well-ordered militia forces (e.g. the SLA or the State National Guards in the United States)” must fulfil four conditions:

1. The combatants must be led by a commander and be part of an organization with a chain of command.
2. The combatants must bear a fixed recognizable distinctive sign that can be recognized from afar.
3. The combatants must bear arms openly.
4. It is incumbent on combatants to behave in compliance with the rules and customs of war.¹³⁰

Any soldier (male or female!) in the enemy’s army is a legitimate military target for attack, whether on the battlefield or outside of it.¹³¹

Israel’s Manual on the Laws of War states that the principle of distinction “clearly imposes the obligation to refrain from harming civilians insofar as possible”.¹³²

8. Find facts reports on War in Gaza

¹²⁷ UN Security Council, Res. 904, 18 March 1994, preamble and § 3.

¹²⁸ UN Security Council, Res. 1073, 28 September 1996, preamble.

¹²⁹ ICRC, *The International Committee’s Action in the Middle East*, IRRC, No. 152, 1973, pp. 584–585.

¹³⁰ Israel, *Manual on the Laws of War* (1998), pp. 47–48.

¹³¹ Israel, *Manual on the Laws of War* (1998), p. 42.

¹³² Israel, *Manual on the Laws of War* (1998), p. 42.

- *Goldstone report, 2009*

Incidents involving the killing of civilians

1718. The Mission found numerous instances of deliberate attacks on civilians and civilian objects (individuals, whole families, houses, mosques) in violation of the fundamental international humanitarian law principle of distinction, resulting in deaths and serious injuries. In these cases the Mission found that the protected status of civilians was not respected and the attacks were intentional, in clear violation of customary law reflected in article 51(2) and 75 of the First AP, article 27 of the Fourth Geneva Convention and articles 6 and 7 of ICCPR. In some cases the Mission additionally concluded that the attack was also launched with the intention of spreading terror among the civilian population. Moreover, in several of the incidents investigated the Israeli armed forces not only did not use their best efforts to permit humanitarian organisations access to the wounded and medical relief, as required by customary international law reflected in Article 10(2) of Additional Protocol 1, but they arbitrarily withheld such access.

1719. With regard to one incident investigated, involving the death of at least 35 Palestinians, the Mission finds that Israeli forces launched an attack which a reasonable commander would have expected to cause excessive loss of civilian life in relation to the military advantage sought in violation of customary international humanitarian law as reflected in Additional Protocol I, articles 57 (2) (a) (ii) and (iii). The Mission finds a violation of the right to life (Article 6 ICCPR) of the civilians killed in this incident.

1720. The Mission also concludes that Israel, by deliberately attacking police stations and killing large numbers of policemen (99 in the incidents investigated by the Mission) during the first minutes of the military operations, failed to respect the principle of proportionality between the military advantage anticipated by killing some policemen who might have been members of Palestinian armed groups and the loss of civilian life (the majority of policemen and members of the public present in the police stations or nearby during the attack). Therefore, these were disproportionate attacks in violation of customary international law. The Mission finds a violation of the right to life (Article 6 ICCPR) of the policemen killed in these attacks who were not members of Palestinian armed groups.

- *Report “No Safe Place”, 30 April 2009¹³³*

463. The Committee cannot accept Israel’s determination of civilians and civilian targets. The civil police, charged with the task of monitoring law and order and traffic control, and the civil employees of the Hamas government do not qualify as combatants. And government offices are not military targets *per se*.³⁰⁵ Article 52(2) of Protocol I states that “military objectives are limited to those objects which by their nature, location and purpose or use make an effective contribution to military action” and whose destruction offers a definite military advantage. In addition there is a presumption against objects “normally dedicated to civilian purposes” being used to

¹³³ http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf

make a contribution to military action. The burden of proof is on Israel to prove that the buildings destroyed were used for military purposes and that the civilians killed were non-civilians. In the opinion of the Committee Israel has not discharged this burden of proof as it has provided no evidence to support its claims that the civilian objects destroyed served any military advantage.

9. Doctrine

*J.S. Pictet, ICRC*¹³⁴

The expression 'in the hands of' is used in extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or 'hands' of the Occupying Power. [...] In other words, the expression 'in the hands of' need not necessarily be understood in the physical sense; it simply means that the person is in the territory which is under the control of the Power in question".

To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The "armed forces" of a State and of a Party to the conflict consist of all organized units and personnel which are under a command responsible for the behaviour of its subordinates . . . The command of the armed forces must be responsible to the belligerent Party to which it belongs. The armed forces shall be subject to an internal disciplinary system which enforces compliance with the law of war.¹³⁵

Interpretive Guidance on the Notion of Direct Participation in Hostilities

The ICRC states that "in order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: (a) be likely to affect adversely military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm); (b) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); [and] (c) the act must be specifically designated to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."¹³⁶

Section 2 – Distinction between civilian objects and military objectives

¹³⁴ J.S. Pictet, (Ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, International Committee of the Red Cross, 1958, p. 47. See also: D. Franck, "Article 8(2)(b)(ii) - Attacking Civilians", in LEE, R.S. (Ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, New York, Transnational Publishers, 2001, p. 140; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, p. 130.

¹³⁵ Frederic de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 36, 40 and 41.

¹³⁶ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, (2008), pp. 995-996.

1. Customary International Humanitarian Law

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects¹³⁷.

Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage¹³⁸.

Rule 9. Civilian objects are all objects that are not military objectives¹³⁹.

Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives.¹⁴⁰

2. Treaties

2.1. Hague Convention IX, 1907

Article 2 allows the bombardment of “military works, military or naval establishments, depots of arms or war *materiel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour”.

2.2. Geneva Convention

Article 19 GC I and Article 18 GC IV use the term “military objectives” without, however, defining it.

2.3. Additional Protocol I

Article 48, adopted by consensus

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 51 – Protection of the civilian population¹⁴¹

¹³⁷ Articles 48 and 52(2) of Additional Protocol I,

¹³⁸ Article 52(2) of Additional Protocol I.

¹³⁹ Article 52(1) of Additional Protocol I.

¹⁴⁰ Loss of protection of civilian objects must be read together with the basic rule that only military objectives may be attacked. It follows that when a civilian object is used in such a way that it loses its civilian character and qualifies as a military objective, it is liable to attack. J-M. Henckaerts and L. Doswald-Beck.

¹⁴¹ ICRC official commentary:

<http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741>

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Article 52 – General protection of civilian objects¹⁴²

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

2.4. ICC Statute

Article 8(2)(b)(ii) – War crime of attacking civilian objects

Constitutes a war crime “intentionally directing attacks against civilian objects, that is, objects which are not military objectives”.¹⁴³

Elements of crime

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.

¹⁴² Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions. ICRC, official commentary:

<http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5f27276ce1bbb79dc12563cd00434969>

¹⁴³ The provision is closely related to article 8 (b)(i) and is similarly an expression of the "principle of distinction" (articles 48 and 51(2) of additional protocol I). Attack" is defined as "acts of violence against the adversary, whether in offence or in defence", Abu Garda, Decision on the Confirmation of Charges, 8 February 2010, para. 65.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

2.5. Lieber Code, 1863

Article 15

Military necessity admits of all direct destruction of life or limb of “armed” enemies, and of other persons whose destruction is incidentally “unavoidable” in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

3. International case law

ICTY, Kordic and Cerkez, 1999 and 2001

In an interlocutory decision in this case in 1999, the ICTY Trial Chamber held that it was “indisputable” that the prohibition of attacks on civilian objects was a generally accepted obligation and that as a consequence, “there is no possible doubt as to the customary status” of Article 52(1) AP I as it reflects a core principle of humanitarian law “that can be considered as applying to all armed conflicts”¹⁴⁴.

In its judgment in 2001, the ICTY Trial Chamber stated that: Prohibited attacks are those launched deliberately against . . . civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused . . . extensive damage to civilian objects. Such attacks are in direct contravention of the prohibitions expressly recognized in international law including the relevant provisions of Additional Protocol I¹⁴⁵.

4. Practice

In a resolution on protection of civilians in armed conflicts adopted in 1999, the UN Security Council strongly condemned all “attacks on objects protected under international law”¹⁴⁶.

A report on the Practice of Israel states that:

In principle, in cases of significant doubt as to whether a target is legitimate or civilian, the decision would be to refrain from attacking the target. It should be stressed that the introduction of the adjective “significant” in this context is aimed at excluding those cases in which there exists a slight possibility that the definition of the

¹⁴⁴ ICTY, Kordic and Cerkez, 2 March 1999, para 31.

¹⁴⁵ ICTY, Kordic and Cerkez, 26 February 2001, para 328.

¹⁴⁶ UN Security Council, Res. 1265, 17 September 1999, para 2.

target as legitimate is mistaken. In such cases, the decision whether or not to attack rests with the commander in the field, who has to decide whether or not the possibility of mistake is significant enough to warrant not launching the attack¹⁴⁷.

5. National references

Israel's Manual on the Laws of War states:

In cases where there is doubt as to whether a civilian object has turned into a military objective, the Additional Protocols state that one is to assume that it is not a military objective unless proven otherwise.¹⁴⁸

6. Doctrine

Report "No Safe Place", 30 April 2009¹⁴⁹

451. Central to the prohibition on indiscriminate attacks on civilians is the question of who constitutes a civilian. Article 50 of Additional Protocol I describes a civilian as a person who is not a member of the armed forces. However, civilians lose their status as civilians and hence their protection, "for such time as they take a direct part in hostilities". According to the study on *Customary International Humanitarian Law* compiled by the ICRC there is no "precise definition of the term 'direct participation in hostilities'" and no definition of this term has been developed in state practice. Care should be taken not to extend this term to cover "civilians whose activities merely support the adverse party's war or military effort". After all, Article 50(1) of Protocol I warns that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian". That there is no easy answer to the determination of when a civilian loses his protection is clear from the judgment of President (Emeritus) Barak in the *Targeted Killing Case* before the Israeli Supreme Court¹⁵⁰ in which he holds that "each and every case "must be examined bearing in mind that "well based information is needed" before a civilian loses his protection, that "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed" and that after a civilian suspected of taking an active part in hostilities has been attacked a thorough, independent investigation is to be conducted "regarding the identification of the target and the circumstances of the attack upon him".

Section 3 – Indiscriminate attacks

1. Customary International Humanitarian Law

Rule 11. Indiscriminate attacks are prohibited¹⁵¹.

¹⁴⁷ ICRC, Report on the Practice of Israel, 1997, Chapter 1.3.

¹⁴⁸ Israel, Manual on the Laws of War (1998), p. 38.

¹⁴⁹ http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf

¹⁵⁰ HCJ 769/02, para 40.

¹⁵¹ Article 51(4) of Additional Protocol I.

Rule 12. Indiscriminate attacks are those:

- (a) which are not directed at a specific military objective;
 - (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;
- and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction¹⁵².

Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.

2. Treaty

Additional Protocol I

Article 51 – Protection of the civilian population¹⁵³

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

¹⁵² Article 51(4)(a) of Additional Protocol I.

¹⁵³ AP I was adopted by 77 votes in favour, one against and 16 abstentions.

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

Article 85(3)(b) AP I, adopted by consensus

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii).

3. International case law

3.1. ICJ

ICJ, Nuclear Weapons case, 1996

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants. States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians . . . Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that

contain them, because they constitute intransgressible principles of international customary law¹⁵⁴.

ICJ, Nuclear Weapons case, 1996, dissenting opinion of Judge Higgins:

Very important also is the requirement of humanitarian law that weapons may not be used which are incapable of discriminating between civilian and military targets. The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack. It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral damage occurs¹⁵⁵.

In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that indiscriminate weapons were “blind weapons which are incapable of distinguishing between civilian targets and military targets”¹⁵⁶.

3.2. ICTY

ICTY, Martić, 1996

In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber had to determine whether the use of cluster bombs was prohibited in an armed conflict. Noting that no formal provision forbade the use of such bombs, the Trial Chamber recalled that the choice of weapons and their use were clearly delimited by IHL. Among the relevant norms of customary law, the Court referred to Article 51(4)(b) AP I, which forbade indiscriminate attacks involving the use of a means or method of combat that could not be directed against a specific military objective¹⁵⁷.

ICTY, Karadžić and Mladić, 1996

In its review of the indictments in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber stated that “throughout the conflict, the strategy of Bosnian Serb forces consisted in indiscriminately targeting civilians. Such was the case during the entire siege of Sarajevo, and at times in the safe areas of Srebrenica, Zepa, Gorazde, Bihac and Tuzla.”¹⁵⁸

ICTY, Kordić and Cerkez, 1999

In an interlocutory decision in the *Kordić and Cerkez case* in 1999, the ICTY Trial Chamber held that it was “indisputable” that the prohibition of indiscriminate attacks was a generally accepted obligation¹⁵⁹.

ICTY, Kupreskić, 2000

¹⁵⁴ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, paras 78–79.

¹⁵⁵ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, paras 23–24.

¹⁵⁶ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, para 5.

¹⁵⁷ ICTY, *Martić*, 8 March 1996, para 18.

¹⁵⁸ ICTY, *Karadžić and Mladić*, 11 July 1996, para 18.

¹⁵⁹ ICTY, *Kordić and Cerkez*, 2 March 1999, para 31.

In its judgment in the *Kupreskic case* in 2000, the ICTY Trial Chamber stated that “attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians”¹⁶⁰.

4. International practice

The 24th International Conference of the Red Cross in 1981 urged parties to armed conflicts in general “not to use methods and means of warfare that cannot be directed against specific military targets and whose effects cannot be limited”¹⁶¹.

5. National references

Israel’s Manual on the Laws of War states:

In any attacks it is imperative to verify that the attack will be carried out employing weapons that can be aimed at the military target.¹⁶²

In any attack it is imperative to verify that the attack will not employ means of warfare whose impact cannot be controlled.¹⁶³

6. Find facts reports on the War against Gaza

*Report “No Safe Place”, 30 April 2009*¹⁶⁴

464. Israel bombed and destroyed many non-governmental, purely civilian objects not associated with either the political or military wing of Hamas, such as hospitals, mosques, schools, factories, businesses and private homes. Obviously the presumption against such objects serving any military advantage is even greater than in the cases referred to above. And again Israel has provided no hard evidence that such premises were used by Palestinian militants or used to store munitions. Vague claims along these lines cannot constitute evidence.

7. Doctrine

*Report “No Safe Place”, 30 April 2009*¹⁶⁵

446. International law prohibits indiscriminate attacks on civilians in both international and non-international armed conflicts. This prohibition applies to attacks on places inhabited only by civilians and places where both civilians and combatants are to be found. In the latter case the attack must be confined to military targets, however difficult this may be. This is clear from Additional Protocol 1 of 1977, whose

¹⁶⁰ ICTY, *Kupreskic*, 14 January 2000, para 524.

¹⁶¹ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIII, § 1.

¹⁶² Israel, *Manual on the Laws of War* (1998), p. 37, see also pp. 11–12.

¹⁶³ Israel, *Manual on the Laws of War* (1998), p. 37, see also pp. 11–12.

¹⁶⁴ http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf

¹⁶⁵ http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf

prescriptions are today viewed as customary international law. Article 48 provides that “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.